

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs July 21, 2009

STATE OF TENNESSEE V. TERRY PHELPS

Direct Appeal from the Circuit Court for Bedford County
No. 16428 F. Lee Russell, Judge

No. M2008-01096-CCA-R3-CD - Filed September 10, 2009

A Bedford County grand jury indicted the Defendant, Terry Phelps, on charges of violating the sex offender registry statute due to failure to register a change of residence. He pled guilty, agreeing to allow the trial court to determine his sentence. Before the sentencing hearing, the Defendant filed a motion to withdraw his guilty plea, which the trial court denied. The trial court sentenced him to three years in the Tennessee Department of Correction (“TDOC”) as a Range II offender. The Defendant now appeals, contending: (1) the trial court erred when it denied his motion to withdraw his guilty plea; and (2) the trial court erred in setting the length and range of his sentence. After a thorough review of the record and the applicable law, we affirm the trial court’s judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JERRY L. SMITH and THOMAS T. WOODALL, JJ., joined.

Emeterio R. Hernando, Lewisburg, Tennessee, for the Appellant, Terry Phelps.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Rachel West Harmon, Assistant Attorney General; Chuck Crawford, District Attorney General; Michael D. Randles, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

On February 7, 2008, the Defendant pled guilty to violating the sex offender registry statute, a class E felony. The Defendant was required to register as a sex offender as a result of his 1985 conviction for aggravated rape, a class A felony. The Defendant also plead guilty, in 1985, to first

degree burglary, a class C felony,¹ and aggravated robbery, a class B felony. The trial court sentenced the Defendant to thirty (30) years for these crimes. In June 2006, the Defendant was released from prison, after having registered with Tennessee's Sexual Offender/Violent Sexual Offender Registration, Verification and Tracking System as required by statute. In October 2007, the Defendant reported to the sex offender registry and updated his information. The Defendant listed his primary address as 591 Warners Bridge Road, Shelbyville, Tennessee, and his secondary address as 114 Ziffell Drive, Murfreesboro, Tennessee.

In November 2007, the Defendant was arrested in Lincoln County on several burglary and theft charges, all of which were later dismissed. During the course of the investigation, detectives learned that the Defendant was staying in Lincoln County with his father and failed to notify the registering agency.

In February of 2008, the Defendant entered an open plea of guilty to violating the sex offender registry statute. The trial court advised the Defendant of the rights he was waiving by pleading guilty and informed him of the range of the sentence he would receive, which was between one and six years. The Defendant acknowledged he understood the consequences of his plea. The prosecutor summarized the evidence supporting the conviction as follows:

[T]he [D]efendant was convicted of aggravated rape back in 1985 in Lincoln County. There were some other felony convictions also entered at that time. In October of 2007, he did[] complete a TBI registration form, that was on October 1st, 2007, here in Bedford County indicating his primary address was an address here in Bedford County and then he had a secondary address in Murfreesboro, Tennessee.

In early to mid November of 2007, the [D]efendant was interviewed by investigators with the Fayetteville Police Department, and he, in that interview, indicated that he had been living at an address in Fayetteville, and been living there approximately two weeks. However, he had not updated his registration here and he had not notified Fayetteville authorities of his move to Lincoln County.

The Defendant acknowledged at his plea hearing that he understood the violation of the sex offender registry based upon the facts presented by the State, he understood the rights he was waiving, and wished to proceed with the open plea.

On March 25, 2008, the Defendant filed a motion to withdraw the guilty plea, asserting that after he discussed the plea with family and friends, he did not believe he was guilty of the charge. At the evidentiary hearing on the motion to withdraw, the Defendant testified he did not understand the basis of his plea. Additionally, the Defendant said he did not understand what would occur at his

¹There is no longer a 1st degree burglary offense in Tennessee. The statutes creating degrees of burglary were repealed by Acts 1989, ch. 591, § 1. The new law governing burglaries is found in Title 39, chapter 14, part 4.

sentencing hearing, explaining he believed he could proceed at trial after the sentencing hearing. The defense asserted that because the Defendant did not understand the law and procedure, the Defendant could not make an intelligent, well-informed and voluntary decision, thus the guilty plea should be withdrawn.

The trial court denied the Defendant's motion to withdraw his guilty plea, finding that the Defendant's plea was entered knowingly, understandingly and voluntarily. The trial court did not find the Defendant's testimony at the hearing credible and found the Defendant "merely had a change of heart" which did not justify his request to withdraw his guilty plea.

At the subsequent sentencing hearing, the Defendant testified that he was not living with his father in Lincoln County but merely visiting to help care for his seriously ill father. The Defendant testified that while in prison for the first degree burglary, aggravated robbery and aggravated rape charges he took the opportunity to better himself. He did so by completing his GED and other vocational training, such as attaining a barber license, cabinet and millwork certificate and a culinary art cooking certificate. The Defendant expressed his desire for the opportunity to be a productive member of society. The Defendant's wife testified as to her continued support of the Defendant and belief that he would not reoffend in the future. The Defendant's sister also testified that the Defendant was helping to take care of their father during his illness in an effort to "make up for lost time," but he did not move to the residence in Lincoln County. Defense counsel argued that the Defendant should be sentenced as a Range I rather than a Range II offender because his previous felony convictions were all committed within twenty-four (24) hours. Further, counsel asserted that the Defendant was a good candidate for alternative sentencing.

The trial court first addressed the issue of range, determining that two of the Defendant's previous felony convictions involved violence and the Defendant was therefore a Range II offender, with an applicable sentencing range of two to four years. Based upon the Defendant's third previous conviction, the trial court enhanced the Defendant's sentence to three years in prison. The trial court then considered applicable mitigating factors and determined the sentence would remain at three years. Due to the short period of time between his release and the charge at issue, the trial court determined the Defendant was not a good candidate for alternative sentencing. It is from this judgment that the Defendant now appeals.

II. Analysis

On appeal, the Defendant claims that the trial court erred when it denied his motion to withdraw his guilty plea and the trial court imposed an excessive and unconstitutional sentence. The State argues that the trial court correctly denied the Defendant's motion to withdraw his guilty plea and that the sentence was appropriate.

A. Motion to Withdraw Guilty Plea

The Defendant asserts that the trial court erred when it denied his motion to withdraw his guilty plea because he misunderstood the law and procedure with regard to his plea. Because the plea was entered unknowingly and involuntarily, the Defendant argues, he has shown a fair and just reason for withdrawing his guilty plea. The State counters that the record sufficiently evidences that the Defendant's motion to withdraw his plea is based merely on a "change of heart" and thus the trial court correctly denied the motion. After a hearing on the motion, the trial court found that the Defendant's plea was entered knowingly, understandingly and voluntarily.

In Tennessee, the standard of review for a trial court's denial of a motion to withdraw a guilty plea has been explained as follows:

A defendant does not have a unilateral right to withdraw a plea. Whether a defendant should be permitted to withdraw a plea is a matter addressed to the sound discretion of the trial court, regardless of when the motion is filed. The trial judge "should always exercise his discretion with caution in refusing to set aside a plea of guilty, to the end that one accused of crime may have a fair and impartial trial." "[W]hen a constitutional violation is shown, the trial court's discretion is strictly curtailed." The trial court's decision "will not be reversed unless it clearly appears that there was an abuse of discretion." An abuse of discretion exists if the record lacks substantial evidence to support the trial court's conclusion.

State v. Crowe, 168 S.W.3d 731, 740 (Tenn. 2005) (citations omitted).

The Tennessee Rules of Criminal Procedure govern the withdrawal of a guilty plea. If a defendant has pled guilty, a trial court may allow the withdrawal of that plea under certain circumstances. Tenn. R. Crim. P. 32 (2008). If it has not yet imposed a sentence, then the trial court may grant a motion to withdraw the plea for "any fair and just reason." Tenn. R. Crim. P. 32(f)(1) (2008). If the trial court has sentenced the defendant, it may grant a motion to withdraw the plea before the judgment becomes final, which is thirty days after the sentence is imposed, and only "to correct a manifest injustice." Tenn. R. Crim. P. 32(f)(2).

Where a petition to withdraw a guilty plea is filed prior to sentencing, as in this case, the standard the defendant must meet is the less stringent "any fair and just reason." Tenn. R. Crim. P. 32(f)(1). Furthermore, it has long been held that a guilty plea will not be set aside simply because the defendant experiences a "change of heart." *Ray v. State*, 451 S.W.2d 854, 856 (Tenn. 1970).

In this case, after considering the facts and the applicable law, we conclude that the Defendant has not shown that the trial court abused its discretion. The Defendant argues that he should have been allowed to withdraw his guilty plea because he did not understand the consequence of this decision. The transcript from the guilty plea hearing, however, confirms that the trial court thoroughly and specifically explained the nature of the charge the Defendant faced, the consequences of an open plea, and the rights the Defendant waived by pleading guilty. The trial court repeatedly asked the Defendant if he understood the guilty plea, to which the Defendant always answered

affirmatively. At the guilty plea hearing, and again at the hearing on the motion to withdraw the guilty plea, the trial court found the Defendant entered his plea voluntarily. We conclude the trial court did not abuse its discretion when it determined the Defendant could not withdraw his plea. As such, the Defendant is not entitled to relief on this issue.

B. Sentencing

On appeal, the Defendant contends that the trial court erred in determining the range and length of the Defendant's sentence. The State counters that the trial court correctly determined the Defendant's range and properly enhanced the length of the sentence based on the Defendant's three prior felony convictions.

When a defendant challenges the length, range or manner of service of a sentence, this Court must conduct a de novo review on the record with a presumption that "the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d) (2006). As the Sentencing Commission Comments to this section note, the burden is now on the appealing party to show that the sentencing is improper. T.C.A. § 40-35-401, Sentencing Comm'n Cmts (2006). This means that if the trial court followed the statutory sentencing procedure, made findings of facts which are adequately supported in the record, and gave due consideration and proper weight to the factors and principles relevant to sentencing under the Sentencing Act, Tennessee Code Annotated section 40-35-103 (2006), the appellate court may not disturb the sentence even if a different result was preferred. *State v. Ross*, 49 S.W.3d 833, 847 (Tenn. 2001). The presumption does not apply to the legal conclusions reached by the trial court in sentencing a defendant or to the determinations made by the trial court which are predicated upon uncontroverted facts. *State v. Dean*, 76 S.W.3d 352, 377 (Tenn. Crim. App. 2001); *State v. Butler*, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); *State v. Smith*, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994).

Specific to the review of the trial court's finding enhancement and mitigating factors, "the 2005 amendments deleted as grounds for appeal a claim that the trial court did not weigh properly the enhancement and mitigating factors." *State v. Carter*, 254 S.W.3d 335, 344 (Tenn. 2008). The Tennessee Supreme Court continued, "An appellate court is therefore bound by a trial court's decision as to the length of the sentence imposed so long as it is imposed in a manner consistent with the purposes and principles set out in sections -102 and -103 of the Sentencing Act." *Id.* at 346.

In conducting a de novo review of a sentence, we must consider: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on the mitigating and enhancement factors set out in Tennessee Code Annotated sections 4-35-113 and -114; (6) any statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee; and (7) any statement the defendant made in the defendant's own behalf about sentencing. See T.C.A. § 40-35-210 (2006); *State v. Taylor*, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001). We must also consider the potential or lack of potential for rehabilitation or

treatment of the defendant in determining the sentence alternative or length of a term to be imposed. T.C.A. § 40-35-103 (2006).

1. The Defendant's Offender Status

The Defendant challenges the constitutionality of the statute governing Range II offender status. He argues that his three prior felony convictions were the result of a “single course of conduct” and the exception in the sentencing statute creates a “status crime” and thus is unconstitutional. The State asserts that this argument is unsupported by the law and urges that the trial court correctly sentenced the Defendant as a Range II multiple offender.

Tennessee Code Annotated section 40-35-106 addresses sentencing a defendant as a “multiple offender.” To classify a defendant as a “multiple offender,” the trial court must first find that the defendant has between two and four prior felony convictions that are either in the same class as the current conviction, a higher class, or within two felony classes lower than the current conviction. T.C.A. § 40-35-106(a)(1)-(2) (2006). The statute goes on to describe how the trial court is to determine how many prior felony convictions the defendant has received. The section relevant to the Defendant's argument in this case is section (b)(4):

Except for convictions for which the statutory elements include serious bodily injury, bodily injury, threatened serious bodily injury, or threatened bodily injury to the victim or victims, convictions for multiple felonies committed within the same twenty-four-hour period constitute one (1) conviction for the purpose of determining prior convictions

T.C.A. § 40-35-106(b)(4).

A status crime is “[a] crime of which a person is guilty by being in a certain condition or of a specific character, such as vagrancy.” Black's Law Dictionary 378 (6th ed. 1999). Generally, culpability for a crime requires specific acts or omissions by the defendant rather than merely the defendant's condition. *See Robinson v. California*, 370 U.S. 660 (1962) (holding a statute criminalizing the status of addiction to be unconstitutional).

Tennessee law is clear that habitual criminal statutes do not create a separate or independent crime but merely define a classification prescribing circumstances in which an enhanced penalty for the current offense is appropriate. *State v. Moore*, 751 S.W. 2d 464 (Tenn. Crim. App. 1988); *State v. Williams*, 675 S.W.2d 499 (Tenn. Crim. App. 1984); *State v. Archie*, 639 S.W.2d 674 (Tenn. Crim. App. 1982).

The Defendant claims that the exception in Tennessee Code Annotated section 40-35-106(b)(4) is unconstitutional because it creates a status crime and thus precludes the trial court from considering the circumstances of the previous convictions. We respectfully disagree.

The law in Tennessee is well settled that differentiating among offenders with respect to their criminal history for purposes of sentencing classification does not create a “status crime.” Therefore, section 40-35-106(b)(4) does not violate the constitution. The trial court examined the Defendant’s criminal history within the context of the statute governing classification. Bodily injury or serious bodily injury are elements of aggravated robbery and aggravated rape, of which the Defendant was previously convicted. Therefore, we conclude that, under the exception in the statute, the trial court properly considered the two felony convictions separately for sentencing purposes and properly found the Defendant a Range II multiple offender. As such, the Defendant is not entitled to relief on this issue.

2. Enhancement of Sentence

The trial court, after determining the Defendant’s classification was Range II multiple offender, went on to enhance the sentence from the minimum within the range, two years, to three years. Defendant asserts that this enhancement is excessive.

The Defendant is required on appeal to make an argument supported by citation to authorities. Tenn. R. App. P. 10 (b). Failure to do so will ordinarily constitute a waiver of the issue. *Id.*; *State v. Watson*, 227 S.W.3d 622, 648 (Tenn. Crim. App. 2006); *State v. Schaller*, 975 S.W. 2d 313, 318 (Tenn. Crim. App. 1997); *State v. Hammons*, 737 S.W.2d 549, 552 (Tenn. Crim. App. 1987)

In the present case, the Defendant discussed his two sentencing issues jointly: (1) “Whether or not the trial court erred in sentencing the appellant to three (3) years to serve as a Range II offender;” and (2) “Whether or not Appellant’s sentence is excessive according to law.” We can find, however, no argument other than the argument relevant to the Defendant’s challenge on the first issue. We find no argument or authority cited in support of the Defendant’s second issue. Therefore, the issue is deemed waived.

III. Conclusion

After a thorough review of the record and the applicable law, we conclude that the trial court did not abuse its discretion when it denied the Defendant’s motion to withdraw his guilty plea. Further, the trial court acted appropriately in sentencing the Defendant. As such, we affirm the trial court’s judgment.

ROBERT W. WEDEMEYER, JUDGE